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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 568

ABBIE HOFFMAN,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Abbie Hoffman, respectfully prays that a writ of certiorari be issued to review the judgment of the Illinois Supreme Court.

JUDGMENT AND OPINION BELOW.

On May 26, 1970, the Illinois Supreme Court denied a petition for rehearing of its order entered on March 24, 1970 affirming the judgment of conviction. The opinion is reported at 258 N.E. 2d 326, and is appended hereto as Appendix A. The order denying the petition for rehearing is appended hereto as Appendix B.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Is the statement by a previously unknown and unidentified citizen that a person has the word "fuck" printed on his forehead, sufficient probable cause to justify arrest of defendant?

2. Is the statement by a previously unknown and unidentified citizen that a person has "fuck" written on his forehead, reasonable grounds to conduct a search?

3. Is it not a search to require an unarrested citizen to remove his hat, for the purpose of seeing if he has anything printed upon his forehead?

4. Is a complaint which charges a violation of a statute which makes it a crime to "knowingly resist or obstruct the performance by one known to the person to be a peace officer of any authorized act within his official capacity" constitutionally vague which fails to allege that an authorized act was resisted, judged by the standards in *Russell v. United States*, 369 U.S. 749?

5. Is a complaint which charges a violation of a statute which makes it a crime to "knowingly resist or obstruct the performance by one known to the person to be a peace officer of any authorized act within his official capacity" constitutionally vague which fails to describe what defendant did to resist?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Amendment I—

> Congress shall make no law . . . or abridging the freedom of speech, . . .

Amendment IV—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment V—

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . .

Amendment VI—

> In all criminal prosecutions, the accused shall . . . enjoy the right to . . . be informed of the nature and cause of the accusation . . .

Amendment XIV—

> [No state shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chap. 38, Sec. 31-1, Ill. Rev. Stat. 1969—

31-1. Resisting or Obstructing a Peace Officer

A person who knowingly resist or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

STATEMENT OF CASE

The facts are adequately set out in the opinion of the Illinois Supreme Court, found in Appendix A, and are incorporated herein.

RAISING THE FEDERAL QUESTIONS

Prior to trial counsel moved to dismiss the complaint on the basis that "said complaint is vague and indefinite and fails to meet the requirements of certainty in criminal statutes as is provided in the Illinois and United States Constitution" (C-9).(1) This motion was not granted. In a petition for rehearing it was argued to the Illinois Supreme Court that the complaint was constitutionally void; and that under its prior holdings in *People* v. *Minto*, 318 Ill. 293 and *People* v. *Buffo*, 318 Ill. 380, a complaint constitutionally void due to vagueness could be raised at any time.

The unconstitutionality of defendant's arrest was raised in the trial court, and considered by the Illinois Supreme Court, ... Ill. 2d ....., 258 N.E. 2d 326, at 328. The court said:

> "It is his contention that his arrest was unlawful and that he had a right to resist an unlawful arrest. We find this argument to be without merit inasmuch as defendant's arrest was based upon probable cause."

(1) "C-9" refers to pagination of Common Law Record of the Record filed in the Illinois Supreme Court and numbered C-1, C-2, etc.

REASONS FOR GRANTING WRIT.

1.

THE CONVICTION WAS BASED UPON EVIDENCE OBTAINED IN A SEARCH CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The conviction was affirmed by the state court's reliance upon evidence obtained in an unconstitutional search. The Illinois Supreme Court affirmed upon the theory that the action of the police was lawful, based upon probable cause to arrest defendant. The court stated:

> "It is his contention, that his arrest was unlawful and that he had a right to resist an unlawful arrest. We find this argument to be without merit *inasmuch* as defendant's arrest was based upon probable cause . . . Defendant then argues that under a proper interpretation of Illinois law, he was not guilty of resisting arrest because the arrest was unlawful. Having determined that defendant's arrest was lawful, we need not consider this issue." (Emphasis added.)

The court's assessment of probable cause was composed of (1) the tip of a previously unknown and unidentified citizen and (2) the officer's view of the word "fuck" on defendant's forehead. The court stated: "The arresting officers testified that they placed defendant under arrest after being informed by a citizen on the street that he had a vulgarism printed on his forehead *and then observed it.*" (Emphasis added.)

In order to find probable cause the court had to rely on both the tip and the police officers' observations, because

the officers did not believe that they had probable cause until they had observed the printing on defendant's forehead. Until the police observed the printing on his forehead, they held back and did not arrest him. (Tr. 26-29).[2] It is clear that the officers did not have sufficient faith in the reliability of the tip of the citizen to justify in their mind the necessary probable cause to arrest a citizen, solely on such "tip."

The observations of the police officers cannot be the basis of probable cause because it was itself the result of an unconstitutional search and seizure. Evidence obtained by either an unlawful arrest, search or seizure cannot be the basis for probable cause. In *Sibron* v. *New York*, 392 U.S. 40, as here, a police officer, absent probable cause, made a search of defendant and discovered evidence. The court said: "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." See also *Davis* v. *Mississippi*, 394 U.S. 721. Nor were the police searching for a weapon as permitted by *Terry* v. *Ohio*, 392 U.S. 1. They desired to see if Petitioner had the word "fuck" printed on his forehead. This was a search not incidental to an arrest and not to protect the officer. It was constitutional only if it satisfied the requirements of the Fourth Amendment to the United States Constitution.

The police only had the statement of a woman. The woman was of unknown reliability. Not even her name or her address was known. She was just a person who did not even remain on the scene. She reported that defendant had "Fuck" written on his forehead. This is equivalent to telling police that a citizen spoke such word. The use of the

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(2) "Tr." refers to Transcript of Trial Proceedings as filed in the reviewing court.

word "Fuck" is not uncommon in American speech. (J. Donald Adams (former editor of New York Times Book Review), "Magic and Mystery of Words", Chapter VIII, Holt, Rinehart & Winston, 1963, pp. 72-73). Considering the *de minimus* nature of the alleged crime, (if crime at all) an accusation from an unknown source cannot raise to probable cause for arrest, search and seizure. The Constitution requires more before an invasion of citizen's rights. *Beck v. Ohio*, 379 U.S. 89 (1964); *Terry v. Ohio*, 392 U.S. 1; *Sibron v. New York*, 392 U.S. 41.

The opinion of the Illinois Supreme Court affirmed, based upon finding that the arrest was lawful. This holding is in error; the arrest was based upon evidence observed in an unconstitutional search.

Hence, certiorari should be granted to resolve this issue.

2.

THE COMPLAINT UPON WHICH DEFENDANT WAS CONVICTED IS SO VAGUE AS TO BE IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION.

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic as in the definition; but it must state the species,—it must descend to particulars.'" *United States v. Cruickshank*, 92 U.S. 542, 558, 23 L. ed. 588, 593. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . , is defective, although it may follow the language of the statute." *United States v. Simmons*, 96 U.S. 360, 262, 24 L. ed. 819, 820. "In an indictment upon a statute, it is not sufficient to set forth

> the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; . . ." *United States* v. *Carll*, 105 U.S. 611, 612, 26 L. ed. 1135. "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell* v. *United States*, 369 U.S. 749, 8 L. ed. 2d 240; 1962.

Applying this principle to the instant case, it is evident that the complaint fails to satisfy the requirements of the constitution.

Defendant was charged with a violation of Chapter 38, Section 31-1, which reads:

> "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity."

Under decisions of the reviewing courts of Illinois an essential element to a conviction under this section is that the officer be in the performance of an authorized act. *People* v. *Roger*, 101 Ill. App. 2d 44; *People* v. *Gasparas*, 98 Ill. App. 2d 391.

The term "authorized act" is totally un-selfdefining due to the multitude of possible conduct which may be authorized police conduct. Hence, in order to comply with the constitutional requirements of informing defendant of the charges against him, it is essential to "descend to particulars", *Russell* v. *United States*, supra, and describe particularly the authorized conduct resisted by defendant.

In the instant case, the complaint reads:

> "Officer Gerald Tavolacci, complainant, now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that Abbie Hoffman has, on or about August 28, 1968 at Clark Street and Lincoln Ave. committed the offense of resisting or obstructing a peace officer in that he knowingly resisted Officer Gerald Tavolacci in the performance of his duties as a peace officer by not coming into the police station peaceably and officers had to forcibly take defendant into custody knowing at this time he resisted Officer Gerald Tavolacci and that he was a peace officer."

Lacking in said complaint were any allegations as to what "authorized conduct" defendant resisted.

The complaint states that defendant did not come into a police station. The complaint does not assert that defendant was under arrest. A citizen, who is not under arrest, does not have to acquiesce to the request of a police officer to visit the police station. Not all encounters between a citizen and a police officer rise to an arrest: *Terry* v. *Ohio*, 392 U.S. 1.

The assertion that defendant failed to comply with the officer's request to come to a police station is not an allegation that defendant resisted an authorized act. The complaint is therefore constitutionally defective in that it fails to advise him of the "nature and cause of the accusation."

The complaint is also defective in that it fails to describe with specificity acts or actions of defendant which amount to the "Resisting or obstructing of a Peace Officer." In *Landry* v. *Daley*, 280 F. Supp. 938 (N.D. Ill. E.D. 1968), the

district court considered the constitutionality of Sec. 31-1, Chap. 38, Ill. Rev. Stat. In holding said statute constitutional, the court limited its application, stating:

> "Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent, or delay the performance of the officer's duties. . . ." (258 N.E. 2d 326, 328)

Hence, to avoid the complaint merely charging activity which would cause the statute to be unconstitutional, a complaint alleging a violation of this section must describe with particularity the alleged actions of defendant. The complaint in the instant case is totally devoid of any specific allegations of conduct. The complaint is therefore constitutionally defective *Russell v. United States*, 369 U.S. 749 (1962).

CONCLUSION.

Petitioner prays that certiorari be granted to resolve the issues herein raised.

Respectfully submitted.

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APPENDIX A

Docket No. 42383—Agenda 26—January, 1970.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. ABBIE HOFFMAN, Appellant.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Defendant, Abbie Hoffman, appeals from the judgment in the circuit court of Cook County rendered in a bench trial finding him guilty of violating section 31-1 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, par. 31-1), *i.e.*, "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be * * * imprisoned in a penal institution other than the penitentiary not to exceed one year * * *." A constitutional question gives us jurisdiction.

On August 28, 1968, at approximately 8:30 A.M., an unidentified woman, standing with a group, waved down a squad car occupied by officers Tavolacci, Lanas and Xalepa, and informed them that a man who had just walked past her had the vulgarism "FUCK" written in red letters on his forehead. She then indicated that the defendant, who was walking with two companions was the man in question. The officers saw him put on a hat and enter a restaurant. They testified that they followed him into the restaurant, approached the booth where he and three companions were seated and asked him what he had under his hat. When he removed his hat, the officers observed the word written in letters about one and one-

half inches in height on his forehead. The police then attempted to place him under arrest. He refused to leave stating: "No, I am going to have breakfast." Officers Tavolacci and Nalepa then left and conferred with a supervising sergeant, Officer Lanas remaining inside. They returned and told Hoffman he was under arrest and that if he did not come peaceably he would be charged with resisting arrest. Defendant refused. One of the officers grabbed him but he pulled away and locked his arm with that of his wife who was sitting next to him. The police then pulled both of them from the booth whereupon Hoffman fell to the ground, went limp and had to be forcibly removed.

Defendant's version of the arrest, which was substantially corroborated by his wife and a companion, was that the police officers entered the restaurant, approached the booth where he was seated and asked him to remove his hat. He questioned their authority to make a search, asked that he be allowed to finish his breakfast, and requested the officers to contact a certain named police commander to determine whether or not he should be arrested. Hoffman stated that two of the officers left the restaurant and returned several minutes later, told him he was under arrest and to remove his hat. He did so and was forcibly taken from the restaurant. He further testified that he offered no resistance.

Defendant was tried on charges of disorderly conduct (Ill. Rev. Stat. 1967, ch. 38, par. 26-1) and resisting a peace officer (Ill. Rev. Stat. 1967, ch. 38, par. 31-1). The court acquitted him of the former charge and found him guilty of the latter offense. The trial court imposed a

sentence of one-year probation, the first 15 days to be served in the House of Correction.

Defendant alleges that he was coerced into waiving his sixth amendment right to trial by jury by the failure of the trial court to grant appropriate relief from prejudicial pretrial publicity; that the trial court's construction of section 31-1 of the Criminal Code of 1961 deprived him of due process of law; that under a proper interpretation of Illinois law he was not guilty of resisting arrest; and that he was not proved guilty beyond a reasonable doubt.

Defendant's claim of adverse pretrial publicity was grounded on the fact that on the evening before trial, an assistant corporation counsel for the city of Chicago appeared on a late-night television show and discussed the coming trial. Only two brief statements of the corporation counsel wherein he discussed the coming trial and expressed his opinion of defendant's guilt have been made part of this record. These have been patently taken out of context. The record indicates that defendant was also present and participated but his statements were not submitted for the record. Furthermore, defendant concedes that the statements made "probably would not have provided a basis for challenging a juror for cause * * *." The statements merely dealt with defendant's arrest for disorderly conduct, the charge of which he was ultimately acquitted. On the following day defendant, urging the "prejudicial" nature of these statements, moved the court for either a continuance for "two years", a change of venue to the "State of New York", or a dismissal of all charges against him. However, there

was no showing as to how he would be prejudiced if he were not granted the relief requested and the trial court accordingly denied his motions.

In this court, defendant now makes the argument that the pretrial publicity was a "fine ploy" on the part of the prosecutorial team to deprive him of a jury trial. He contends that he was coerced into waiving his right to a jury trial because relief from the pretrial publicity was denied. He argues thusly: "The prosecution had an almost uncontested case on the facts of the disorderly conduct case it had charged, but the case on resisting arrest was a hotly contested one in which the state had no disinterested witness. By exposing the facts of the disorderly charge and then making that easy proof the testimony of the same witnesses on the resisting became more plausible—'for hadn't the officers told the truth in the first part of their testimony.'" We find this argument to contain more rhetoric than reason. Defendant completely ignores the fact that he also voluntarily appeared on that same television program, and concedes that the statements made were insufficient to cause prejudicial error. Furthermore, there has been no showing that the ruling of the trial judge was erroneous. The granting of a continuance was within the sound discretion of the trial judge and absent a showing of abuse, that determination will not be reversed. (*People* v. *Kurtz*, 37 Ill. 2d 102.) Further, there was no showing why a change of venue to the "State of New York" was appropriate or even how the State of New York could attain jurisdiction over this matter. We find no error.

Defendant next argues that the trial court's interpretation of section 31-1 of the Criminal Code deprived him of

due process of law. It is his contention that his arrest was unlawful and that he had a right to resist an unlawful arrest. We find this argument to be without merit inasmuch as defendant's arrest was based on probable cause. The arresting officers testified that they placed defendant under arrest after being informed by a citizen on the street, that he had a vulgarism printed on his forehead, and they observed it. In *People* v. *Hester*, 39 Ill. 2d 489, 513, 514, we said that "'reasonable cause' to make an arrest without first obtaining a warrant 'means something less than evidence which would result in a conviction (*People* v. *Jones*, 38 Ill. 2d 427, 431), and the absence of a warrant may justifiably be made to depend upon 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' (*Brinegar* v. *United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302; *People* v. *Pitts*, 26 Ill. 2d 395, 399.)" The officers here were justified in relying on the information received from the woman and, the usual requirement of prior reliability which must be met when police act upon "tips" from professional informers does not apply to information supplied by ordinary citizens. (See *People* v. *Hester*.) Accordingly, we find that these officers had probable cause to arrest defendant for disorderly conduct. The fact that the defendant was later discharged of this offense in no way detracts from the validity of the arrest.

Defendant then argues that under a proper interpretation of Illinois law, he was not guilty of resisting arrest because the arrest was unlawful. Having determined that defendant's arrest was lawful, we need not consider this issue.

(Supreme Court Opinion)

Finally, defendant complains that he was not proved guilty beyond a reasonable doubt. Essentially, he argues that the clash of testimony in this case is so extreme that proof beyond a reasonable doubt was not adduced. We find that defendant's argument is predicated on the question of the credibility of the testifying witnesses. The resolution of testimonial conflicts is appropriately a matter for the trier of fact and only where the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt will the trial court's determination be disturbed. (*People* v. *Hampton*, 44 Ill. 2d 41, 44; *People* v. *Flowers*, 14 Ill. 2d 406, 410.) After a thorough review of the record in this matter we find the evidence supports the conviction. *People* v. *Raby*, 40 Ill. 2d 392.

The judgment of the circuit court of Cook County is accordingly affirmed.

Judgment affirmed.

APPENDIX B

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss.

At A Term Of The Supreme Court, begun and held in Springfield on Monday, the eleventh day of May in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer Justice Thomas E. Kluczynski
Justice Daniel P. Ward Justice John T. Culbertson, Jr.
Justice Caswell J. Crebs Justice Marvin F. Burt
William J. Scott, Attorney General
Robert G. Miley, Marshall
Attest: Justin Taft, Clerk

Be It Remembered, that, to-wit: on the 26th day of May, A.D. 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois, Appellee		Appeal from Circuit Court Cook County (Municipal Division)
No. 42383 vs.		
Abbie Hoffman, Appellant		

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.